



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fort Letterkenny Army Depot Request for
Decision on Payee's Liability for Payments
Received Using Fraudulent Travel Claims

File: B-247506

Date: March 29, 1993

DIGEST

Comptroller General decision, 70 Comp. Gen. 463 (1991), which modified prior cases instructing agencies to apply the "tainted day" rule in deciding the liability of fraudulent payees and the accountable officers who made the erroneous payments, applies prospectively to determinations of liability made after May 6, 1991. Cf. 63 Comp. Gen. 281 (1984). Any suggestion to the contrary in 70 Comp. Gen. 463 is modified accordingly.

DECISION

The Director of Personnel and Community Activities, Department of the Army, Fort Letterkenny Army Depot, Chambersburg, Pennsylvania, requests a decision on the liability of federal employees for payments received using fraudulent travel and subsistence expense claims (fraudulent travel claims). The request was prompted by our decision at 70 Comp. Gen. 463 (1991), which held that the accountable officer involved was liable only for fraudulent overpayments, and rejected continued use of the "tainted day" rule in deciding the liability of accountable officers and fraudulent payees. Under the tainted day rule, a fraudulent claim for reimbursement for any part of a single day's subsistence expenses taints with fraud the entire day's subsistence expenses. The Director asks whether our decision should be applied retrospectively to the federal employees involved.

For reasons set forth below, we conclude that our 1991 decision should be applied prospectively only, and therefore the liability of these federal employees was properly computed based on the tainted day rule.

BACKGROUND

The debts at issue stem from a travel fraud scheme in which military members and employees of Fort Letterkenny allegedly obtained reimbursement for lodging expenses based on inflated bills provided by the Siesta Motel in El Paso,

Texas, from 1976 through 1983. In 1983, following an investigation by the Army Criminal Investigation Division and the Federal Bureau of Investigation, 83 civilian employees and a soldier at Fort Letterkenny were determined to have been paid a total of \$74,409.98 for fraudulent travel claims. The Department of Justice obtained indictments against twenty employees and prosecuted them. Thirteen of the 20 received two year suspended sentences plus two years probation. The court required all 20 to pay both the fraudulently claimed amounts and fines.

The remaining 63 civilian employees who were not criminally prosecuted were notified of their indebtedness and allowed to exercise their rights under the Debt Collection Act.¹ The Army decided the amounts of indebtedness based on the tainted day rule.

DISCUSSION

The act of June 25, 1948, 28 U.S.C. 2514, provides that a claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof. Pursuant to this statutory provision, we have held that if fraud is suspected in connection with a claim before an agency, the claim should be denied as a doubtful claim, and the claimant should be left to his remedy in the United States Court of Federal Claims (formally the Claims Court) for a determination of whether the forfeiture statute should be applied. 41 Comp. Gen. 206 (1961).

Although the forfeiture statute does not apply to paid vouchers, before our 1991 decision we took the position that if any item of pay and allowances was wrongfully obtained due to a fraudulent statement, it was to be treated as an erroneous payment for recoupment as such. 41 Comp. Gen. 285 (1961). Agencies were instructed to apply the tainted day rule to establish and recover the amount of debt owed by fraudulent payees in these circumstances. In applying our tainted day rule, however, we made no distinction between fraudulent payees and accountable officers in deciding their liability for the payment of fraudulent claims. 59 Comp. Gen. 99 (1979).

¹In unpublished Comptroller General decision, B-224750, Sept. 25, 1987, addressing the procedural due process rights of three of Fort Letterkenny's fraudulent payees, we held that the Army could collect the erroneous payments by salary offset only pursuant to section 5 of the Debt Collection Act, 5 U.S.C. § 5514.

In 70 Comp. Gen. 463, we modified our decisions that had instructed agencies to apply the tainted day rule in recouping from accountable officers who made fraudulent payments. Although the issue was not directly raised in the facts of that case, we also stated that the tainted day rule should no longer be applied in deciding the liability of fraudulent payees.

With regard to accountable officers, we decided that their liability for improperly paying fraudulent travel claims is the amount of the actual fraudulent overpayment resulting from the fraud. 70 Comp. Gen. at 468. Accountable officers are strictly liable for losses of government funds under their control. Serrano v. United States, 612 F.2d 525, 528 (Ct. Cl. 1979). Since the amount that the government has lost by paying a fraudulent travel claim is the amount of the overpayment resulting from the fraud, we concluded that an accountable officer's liability should not include the non-fraudulent amount covered under the tainted day rule. 70 Comp. Gen. at 468. Underlying our conclusion was the view that the addition of the non-fraudulent amount to the amount of an accountable officer's liability injected a punitive element into the measure of their liability that neither the law nor public policy required.

In contrast, the liability of a fraudulent payee is subject to a different legal standard and therefore needs to be differently determined from that of an accountable officer. In our 1991 decision, we stated that "[a]gency actions against fraudulent payees should be taken in light of the provisions of the False Claims Act, the Program Fraud Civil Remedies Act, the Debt Collection Act, and the Federal Claims Collection Standards, as well as any other statutes and regulations applicable to recovering the fraudulent payment involved." Id. at 469.

The federal government's rights against fraudulent payees are governed principally by the False Claims Act, 31 U.S.C. §§ 3729-3733, and the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812.² The False Claims Act provides that a person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment "is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages that the government sustains

²Although the federal government may continue to pursue, in its discretion, fraudulent payees under the Debt Collection Act, as a result of our decision in 70 Comp. Gen. 463 (1991), agencies may no longer include non-fraudulent payments in computing a fraudulent payee's debt to the government.

...," 31 U.S.C. § 3729(a). The measure of the government's damages is the amount paid above what would have been paid had the claim been truthful, not the total amount claimed. 70 Comp. Gen. at 466-67. Thus, persons who received payment based on fraudulently inflated lodging bills, could potentially be held liable to the federal government for a civil penalty of \$10,000 plus 3 times the amount of the fraudulent overpayment. The United States recovers these amounts in suits brought by either the Justice Department or private parties suing on behalf of the United States. 31 U.S.C. § 3730.

Alternatively, the federal government could pursue fraudulent payees in accordance with the Program Fraud Civil Remedies Act, which provides for a civil penalty of \$5,000 per false claim for cases involving claims of not more than \$150,000. 31 U.S.C. §§ 3802, 3803. Additionally, payees are subject to an assessment, instead of damages sustained by the United States, of not more than twice the fraudulently claimed amount. 31 U.S.C. § 3802(a)(1); 70 Comp. Gen. at 468. The Act provides for administrative proceedings to decide the liability of fraudulent payees. 31 U.S.C. § 3803.

The Program Fraud Civil Remedies Act, enacted in 1986, provides an administrative remedy for false claim and false statement cases under \$150,000. Because it was economically impractical for Justice to go to court when litigation costs exceeded the amount that may be recovered, the Justice Department had historically declined to litigate under the False Claims Act. H. Conf. Rep. No. 99-1012, 99th Cong., 2d Sess. 258, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3868, 3902. With the passage of the Program Fraud Civil Remedies Act, the government had a cost-effective remedy in small-dollar cases. Id.

As explained above, we applied the tainted day rule to fraudulent payees in order to place them in the same position as fraudulent claimants under the forfeiture statute. Our 1991 decision discontinued using the tainted day rule for fraudulent payees in recognition of the fact that the Program Fraud Civil Remedies Act now provides agencies with an effective remedy for small-dollar cases, so that application of the tainted day rule was no longer necessary. Additionally, as discussed in 70 Comp. Gen. 463, we also wanted to align our position on the deterrence and punishment of fraudulent payees with the position taken by the courts in decisions under the forfeiture statute, 28 U.S.C. § 2514, and the False Claims Act, and the remedies made available to the government by the Program Fraud Civil Remedies Act. 70 Comp. Gen. at 467.

Since our decision to discontinue using the tainted day rule was not compelled by law, but merely represented a change in the collection procedure to be followed against a fraudulent payee, it should be applied prospectively only, effective as of May 6, 1991, the date of the decision. 63 Comp. Gen. 281 (1984). The Army's reliance on our earlier decisions and the government's need for finality in its administrative process argues convincingly against retroactive application of our holding in 70 Comp. Gen. 463. Any suggestion to the contrary in 70 Comp. Gen. 463 (1991) is modified accordingly.

The Army's determinations of indebtedness were made in 1984, before the issuance of 70 Comp. Gen. 463. Since the Army's use of the tainted day rule to compute the liability of the employees at issue here was not inconsistent with law, the Army properly decided the indebtedness of the fraudulent payees, and need not recalculate the indebtedness to exclude amounts more than amounts fraudulently claimed.

The holdings in our cases do not apply to the 20 fraudulent payees who were criminally prosecuted by the United States. Their obligations to repay fraudulently claimed amounts and to pay fines were judicially imposed and therefore are not affected by our decisions.

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for Comptroller General
of the United States